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VIA ELECTRONIC SUBMISSION

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW – Lobby Level
Washington, D.C. 20554

Re: Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68

Dear Ms. Dortch:

SBC understands that the Commission is nearing a decision in response to the D.C. Circuit's remand of the Commission's intercarrier compensation rules for ISP-bound calls. In drafting its order, the Commission should take care to ensure that it does not foreclose its future jurisdiction to adopt a unified intercarrier compensation regime for *all* telecommunications traffic, including all access traffic. In particular, the Commission should avoid any suggestion that, by its own terms, section 251(b)(5) must be construed in a way that permanently excludes ISP-bound traffic—and, by implication, intrastate access traffic—from its scope. The reason is that, although ISP-bound traffic falls within the scope of the Commission's section 201 jurisdiction over interstate traffic, purely intrastate traffic does not. As to such intrastate traffic, the Commission may need to rely on its broad section 201(b) authority to promulgate rules necessary in the public interest to carry out section 251(b)(5) to design a genuinely unified intercarrier compensation regime for all telecommunications traffic.[1/] In this letter, we discuss several means by which the Commission may impose bill-and-keep for ISP-bound traffic without adopting an unduly narrow view of the permanent scope of section 251(b)(5) or of the Commission's own supplemental authority to address traffic falling within the scope of that provision.

As the Commission has repeatedly found, ISP-bound traffic is a form of interstate "information access" and is part and parcel of the interstate access regime;[2/] indeed, that is the premise of the

[1/] *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378-380 (1999) (holding that the Commission has plenary jurisdiction to address any issues arising under sections 251 and 252).

[2/] *See, e.g. MTS and WATS Market Structure,* Memorandum Opinion and Order, 97 FCC 2d 682 (1983), ¶ 78 ("among the variety of users of access services are … enhanced service providers." The D.C. Circuit has recognized that ISPs are purchasers of interstate access. *See National Ass'n of Regulatory Util. Commissioners v. FCC,* 737 F.2d 1095, 1136-37 (D.C. Cir. 1984).

Commission's exercise of exclusive jurisdiction over this traffic. Like an IXC, an ISP is an interstate transport provider with its own independent relationships with subscribers.[3/] The interstate access regime treats these two types of providers identically for compensation purposes in all but one respect. Under the "ESP exemption," developed in the 1980s to promote the then-fledgling enhanced services industry, the Commission exempted ISPs and their ESP forerunners from having to pay carrier access charges for the connections to their subscribers. Instead, the Commission prescribed a *different* compensation regime for those connections. Under that regime, ISPs may "pay local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices. [They] also pay special access surcharges for private lines under the conditions set out in [the Commission's] rules."[4/]

In establishing this alternative access charge regime for the connections between ISPs and their subscribers, the Commission has specifically held that the payments made pursuant to this regime are intended to compensate the LEC for *all* switching functions it performs for its ISP customer.[5/] Thus, when a LEC delivers Internet-bound traffic to an ISP, the charges the LEC is permitted to levy on that ISP are deemed to provide that LEC with *full* compensation for its call "termination" service.[6/] That is why, when some LECs complained to the Commission in 1997 that they were not fully recovering their costs of providing call "termination" services to ISPs, the Commission told them that their appropriate remedy was to raise the rates they charged their ISP customers pursuant to the ESP exemption rate structure.[7/] No less so than per-minute carrier access charges, the flat charges permitted pursuant to the ESP exemption were intended to provide full compensation.

As discussed below, there is no dispute that section 251(g) preserves the ESP exemption and its associated compensation rules. That fact has two independent consequences for the ISP remand controversy. *First*, the preservation of the ESP exemption by section 251(g) can make sense only if the Commission's authority under section 251(i) (and 201) permit it to require bill and keep for ISP-bound

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[3/] The interstate access regime applies to all providers that offer interstate transport to the public, whether or not they are vertically integrated with an entity that provides the actual physical transmission. Just as that regime applies to any IXC that deals with the public, whether it is a facilities-based carrier or a reseller, so also does it apply to any ISP, whether or not it is vertically integrated with an Internet backbone provider.

[4/] *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers,* 3 FCC Rcd 2631, ¶ 2, n. 8 (1988)

[5/] *MTS and WATS Market Structure,* ¶ 89 ("all switching functions will continue to be subsumed under the local business rate.")

[6/] In this respect, ISP-bound traffic is different, as a categorical matter, from local traffic. Although individual customers' calling patterns differ, consumers purchasing local service generally require both originating and terminating functionality from their LEC, and (as discussed below) the fees they pay to their LEC are currently deemed to provide compensation only for call *origination*. That is why, under the current reciprocal compensation rules, LECs that originate traffic must compensate LECs that terminate traffic: the theory is that the originating LEC has been paid to carry the call and the terminating LEC has not. With ISP-bound traffic, in contrast, the LEC terminating the call to the ISP plainly has been compensated: since that LEC provides only call "termination" service, the fees it receives from its ISP customer must be for that service.

[7/] *Access Charge Reform,* First Report and Order, 12 FCC Rcd 15982, ¶ 346 (1997) *aff'd, Southwestern Bell Tel. Co. v. FCC,* 153 F.2d 523 (8th Cir. 1998).

traffic handled by two LECs. Although, in the *WorldCom* litigation,[8] the Commission previously cited section 251(g)'s preservation of the ESP exemption, it failed to explain to the D.C. Circuit why the application of bill and keep under these circumstances is a necessary corollary to the ESP access charge regime. Since the grandfathered ESP compensation rules fully cover the costs of an ISP-serving LEC, permitting that LEC to recover reciprocal compensation for those *same* services, simply because the traffic originates with another carrier, would entitle it to double recovery. This windfall can be avoided, and the integrity of the ESP exemption preserved, only if the Commission's authority under section 201 of the Act, as preserved by section 251(i), empowers the Commission to exclude such calls from section 251(b)(5)'s otherwise duplicative compensation obligation.

Second, quite apart from the Commission's authority under sections 201 and 251(g) and (i), the compensation rule under the ESP exemption governing what ESPs owe LECs for call-termination services already fully covers the costs of those services, such that a LEC's "additional costs" of "terminating" that traffic to an ISP modem bank, for purposes of section 252(d)(2)(A)(ii), are zero. Finally, as SBC has explained in prior filings,[9] the bill-and-keep savings clause of section 252(d)(2)(B)(i) permits the Commission to transition to bill and keep (as provided by the ICF plan) for all traffic falling within the scope of section 251(b)(5), whether it is "balanced" or not.

1. Section 251(g) preserves, pending further FCC rulemaking, the Commission's access charge regime. That regime includes the ESP exemption, which is one of the "restrictions and obligations" concerning "receipt of compensation" that "apply to [LECs]." 47 U.S.C. § 251(g). The "ESP exemption" is the FCC rule that ISPs may obtain access services by ordering "end user" lines from local exchange carriers' local business tariffs (or leasing private lines and paying an additional surcharge). *See MTS/WATS Market Structure Order* 97 FCC 2d 682 ¶¶ 77-83 (1983). The FCC adopted that rule after first recognizing that ISPs are "[a]mong the variety of users of access services," *id.*, and are properly subject to "carrier's carrier charges." *Id.* ¶ 76

Because it was created in the 1980s, the ESP exemption was modeled without the post-1996 Act competitive environment in mind. When the Commission adopted the exemption under section 201 of the Act, it addressed only the scenario in which one LEC is involved in delivering traffic to an ISP (or, more specifically, its ESP predecessor). Indeed, before the 1996 Act was passed, there were few or no scenarios in which two LECs would cooperate in transmitting an end user's call to an ISP. Thus, the compensation rules prescribed by the ESP exemption regime give LECs the opportunity to fully recover their costs from their ISP customers.

For that reason, "preserving" the ESP exemption's constituent compensation rules *without* making any adjustments to accommodate the new two-LEC realities of the ISP marketplace would produce absurd market distortions. Specifically, if those compensation rules are applicable where two LECs are involved in the transmission of a call to an ISP served by the second LEC, and if that second LEC is entitled to reciprocal compensation as well under section 251(b)(5) of the Act, the result would be a substantial windfall to that LEC, which would plainly be over-recovering the costs of terminating the call to the ISP. Under that approach, for example, an ILEC serving an ISP would be able to recover both the standard business line rate from the ISP, which theoretically already covers all costs of delivering

[8] *See WorldCom, Inc. v. FCC,* 288 F.3d 429, 434 (D.C. Cir. 2002).

[9] *See, e.g.,* Comments of SBC Communications, *Developing a Unified Intercarrier Compensation Regime*, CC Docket 01-92, at 43-46 (August 21, 2001).

calls to the ISP, plus reciprocal compensation rates designed to cover *those same costs* from CLECs that originate calls from the ISP's subscribers. Such double recovery is no less perverse and unlawful when the carriers' roles are reversed: *i.e.,* when a CLEC serves the ISP and the ILEC serves the ISP's subscribers.

Although the *ISP Remand Order* mentioned section 251(g)'s preservation of the ESP exemption, the Commission failed to explain why the preservation of that rule necessarily authorizes the Commission to require bill and keep for ISP-bound traffic. In particular, the D.C. Circuit questioned the link between the ESP exemption and the grandfathering of ISP-bound traffic from the scope of section 251(b)(5) and the pricing rules of section 252(d)(2).[10/] In fact, however, the proper analysis does not (as the Commission had argued) require a reading of section 251(g) that automatically entitles the Commission to create whatever new rules it sees fit for ISP-bound traffic. Rather, the reason that the Commission must have authority to exempt ISP-bound traffic from LEC-to-LEC reciprocal compensation under section 251(b)(5) is that such compensation would otherwise produce absurd and unjust windfalls when combined with the indisputably grandfathered compensation rules of the ESP exemption regime. And section 251(i) preserves the Commission's authority to preserve the integrity of this and other grandfathered regimes by providing that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201."[11/] If section 251(i) means nothing else, it means at least this; indeed, reading section 251(i) *not* to preserve the Commission's authority in this respect would divest that provision of significance.

In sum, the only rational approach to this statutory scheme is to interpret section 251(i) as empowering the Commission to exercise its section 201 authority to modify the section 201 compensation rules grandfathered under section 251(g) so that they make sense. Section 251(i) necessarily preserves the Commission's section 201 authority to provide that, when two LECs cooperate to deliver traffic to an ISP served by one of the two LECs, any compensation that LEC receives from the ISP for terminating traffic to its modem bank shall be deemed to disqualify the LEC from receiving any additional

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[10/] Some language in the D.C. Circuit's *WorldCom* decision can be read to suggest that section 251(g) itself does not justify excluding ISP-bound traffic from the scope of section 251(b)(5). The better reading of that decision, however, is that the court rejected the particular arguments the Commission had cited in its *ISP Remand Order* for relying on section 251(g). In all events, the court did not foreclose the Commission from invoking section 251(i) to preserve the integrity of the indisputably grandfathered ESP exemption regime. And the court would be less likely even to reach the question of section 251(g)'s reach in any subsequent appeal if the Commission combines a determination under sections 251(g) and 251(i) with an alternative determination that, whether or not this traffic is currently subject to the pricing rule of section 252(d)(2), bill-and-keep is the proper choice of methodologies—a holding that the WorldCom court all but encouraged the Commission to adopt. *See WorldCom,* 288 F.3d at 434 (declining to vacate the *ISP Remand Order* because "there is plainly a non-trivial likelihood that the Commission has authority to elect" bill and keep under alternative theories).

[11/] 47 U.S.C. § 251(i). The Conference Report on the Act specifically elaborates: "New subsection 251(i) makes clear the conferees' intent that *the provisions of new section 251 are in addition to, and in no way limit or affect, the Commission's existing authority regarding interconnection under section 201 of the Communications Act.*" H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 116 (1996) (emphasis added).

compensation from the *other* LEC for performing the same function. No other result effectuates Congress's desire to "preserve" of the ESP exemption, like other access charge rules, in a way that makes any sense in a post-1996 Act universe.[12]

2. In any event, bill-and-keep would be the appropriate compensation rule for ISP-bound traffic even if sections 251(g) and 251(i) were deemed not to permit the Commission to craft rules to adapt the ESP exemption to the two-LEC scenario. First, compensation for traffic not grandfathered by section 251(g) has always been governed by a "calling party's network pays" rule. This CPNP rule prescribes retail end user rates that cover the origination, but *not* the termination, of such traffic; the costs of call termination are covered instead by wholesale reciprocal compensation rates. No matter what its legal characterization, ISP-bound traffic has always been an exception to this rule. Because ISPs originate no calls from the Internet back to the PSTN, the business line rates they pay LECs could logically cover *only* the costs of termination calls to the ISPs' modem banks. This necessarily means that, for purposes of section 252(d)(2)(A)(ii), a LEC incurs no "additional costs" for delivering ISP-bound traffic to those modem banks beyond the costs *already* addressed under the existing retail cost-recovery regime. Again, entitling ISP-serving LECs to receive, from originating LECs, positive reciprocal compensation for handling such traffic would lead to massive double recovery, for the reasons discussed above.

Second, as the *WorldCom* court itself suggested (288 F.3d at 434), the bill-and-keep savings clause of section 252(d)(2)(B)(i) is properly construed to permit a bill-and-keep rule for all traffic, whether balanced or not. The ICF will address this and other issues relating to sections 251(b)(5) and 252(d)(2) in subsequent filings.

Sincerely,

Gary J. Phillips

cc: Austin Schlick
Jeff Dygert
Chris Killion
Tamara Preiss
Rob Tanner
Steve Morris
Victoria Schlesinger
Christopher Libertelli
Dan Gonzalez
Scott Bergmann
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[12] Although a bill and keep regime is the only regime that is consistent with the ESP access charge exemption because *it is the only* regime that avoids double recovery, the Commission has authority to order a transition to bill and keep, as the ICF plan envisions, in order to avoid undue industry disruption. *See, e.g., CompTel v. FCC*, 309 F.3d 8, 15 (D.C. Cir. 2002); *CompTel v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (recognizing the Commission's expansive authority to take any interim measures needed to protect the industry from sudden disruptions).